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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DIANE WEST-JENSEN, et al.,

Plaintiffs and Appellants,

v.

WILLIAM WISBROD, et al.,

Defendants and Respondents.

H026453

(Santa Cruz County
Super. Ct. No. CV145532)

Norman Weisbrod (Ned)[1] died intestate in Texas on March 31, 1996, without a surviving parent, spouse, or issue. His estate was valued at approximately $840,000, and was distributed to his sister Lillian Coplan, his half-brother William Wisbrod, and his nephews Gregory Ellis and Geoffrey Ellis. Diane West-Jensen, Lester Wisbrod, and Annette Karlas (plaintiffs) are Ned's half-siblings, and allege that they were entitled to a share of Ned's estate. Plaintiffs filed a complaint for deceit, conversion, constructive trust, money had and received, conspiracy and an accounting, against William, Michael Wisbrod, Gregory and Geoffrey (defendants), in the Santa Cruz County Superior Court on January 24, 2003. (*West-Jensen v. Wisbrod* (Super. Ct. Santa Cruz County, 2003,

[1] In order to avoid confusion because several parties have the same last name, and not out of any disrespect, we will hereafter refer to the parties and other related individuals by their first names.

No. CV145532).) On July 11, 2003, the trial court filed an order granting the motions of William, Michael, and Gregory to quash service of summons based on lack of personal jurisdiction, and granting all defendants' motions to dismiss based on forum non conveniens.

Plaintiffs have appealed, arguing that the trial court erred in granting the motion to quash, as California has specific jurisdiction over defendants because they purposefully availed themselves of this forum's benefits. Plaintiffs further argue that the trial court erred in dismissing the action after finding Texas to be the more convenient forum. Lastly, plaintiffs argue that defendants' stipulation to the continuance of a case management conference constitutes a general appearance, which waives the right to contest personal jurisdiction. We disagree with all these contentions, and therefore affirm.

BACKGROUND

Ned's father was Elliott Wisbrod. Elliott married three times. Elliott and his first wife Jenny Weisbrod had two children, Lillian and Ned. After Elliott's first marriage was dissolved he married Sophia Wisbrod. Elliott and Sophia had two children, William and Geraldine (now deceased), and three grandchildren, Michael, Gregory, and Geoffrey. Michael is William's son, and Gregory and Geoffrey are Geraldine's sons. Elliott also married Rose Wisbrod, and plaintiffs are their three children. Elliott and Rose's marriage was annulled after plaintiffs' birth because Elliott's marriage to Sophia had never been dissolved.

Plaintiffs reside in California. Geoffrey resides in Santa Cruz County. Gregory resides in Virginia. William and Michael reside in Illinois. Lillian resides in Texas.

When Ned died intestate in Texas on March 31, 1996, without a surviving parent, spouse, or issue, Lillian petitioned the probate court in Dallas County, Texas, in July 1996 for letters of independent administration, stating that she and William were Ned's only known heirs. Gregory and Geoffrey were notified of the administration of the estate and, in December 1996, consented to the appointment of Lillian as independent administrator.

On January 24, 2003, plaintiffs filed a complaint against defendants for deceit, conversion, constructive trust, money had and received, conspiracy and an accounting.[2] The complaint alleges the following. Under Texas probate law, Ned's estate should have passed to all his siblings or their issue, with each full sibling or issue receiving twice the amount received by each half-sibling. An attorney, R. W. Calloway of Dallas, Texas, was appointed to locate, contact, and represent the interests of any estate beneficiaries yet unknown to the probate court. Defendants were aware that plaintiffs are Ned's half-siblings, and thus entitled to a share of Ned's estate, but did not inform Calloway or the Texas probate court of this fact. Ned's estate was distributed by the Texas probate court to Lillian, William, Geoffrey and Gregory.

Plaintiffs served Gregory in Virginia with a copy of the summons and complaint by certified mail on or about March 8, 2003. William was served by certified mail in Illinois on or about March 10, 2003.

On or about April 7, 2003, William and Michael filed a motion to quash service of summons and complaint for lack of personal jurisdiction. They alleged that they do not reside in California and have never done so, they do not have a place of business in California and have never had one, they do not own any property in California, and they do not consent to the exercise of jurisdiction over them by the courts of the state of California. On or about April 8, 2003, Gregory filed a motion to quash service of summons and complaint for lack of personal jurisdiction. Gregory alleged that he moved from California to Virginia in 1970; he resided in California for several months in 1974,

[2] At oral argument appellants claimed that, upon reversal by this court of the trial court's order of dismissal, they will immediately file and serve a first amended complaint deleting the fraud and deceit causes of action. We have not considered this claim as it was not before the trial court and therefore is not supported by the record on appeal.

then moved back to Virginia; he has been in California to visit his father and brother for one week in each of 1997, 1998, 1999, and 2000; he owns no property in California; he signed all documents in the Texas probate proceedings in Virginia; and he received his share of the estate in Virginia.

William and Michael also filed a motion to dismiss or stay the action based on forum non conveniens. They alleged that Texas is the most suitable forum for the action as all defendants are already subject to Texas jurisdiction, Texas probate law already provides a procedure for plaintiffs to air their alleged grievances, and Texas has the greater interest in the litigation. Gregory filed a motion to stay or dismiss the action on or about April 8, 2003. On or about May 27, 2003, Geoffrey filed a demurrer to the complaint based upon lack of subject matter jurisdiction as well as a motion to dismiss or stay the action based on forum non conveniens.

Plaintiffs filed opposition to the motions to quash on or about June 9, 2003. Plaintiffs argued that the actual conversion of plaintiff's property occurred in part in Santa Cruz, thus California has jurisdiction over defendants notwithstanding their otherwise minimal contacts with California. Plaintiffs also filed opposition to the motions to dismiss or stay the action based upon forum non conveniens, arguing that, while certain events occurred in Texas and aspects of Texas law are relevant to plaintiffs' claims, it requires no Texas proceeding or discovery to establish the foundational events and law permitting plaintiffs' recovery.

A hearing was held as to all the motions on June 24, 2003. The court's order granting the motions to quash service of summons, overruling the demurrer, and granting the motions to dismiss based on forum non conveniens was filed July 11, 2003. The order states in relevant part: "The Court finds that defendants WILLIAM WISBROD'S, MICHAEL WISBROD'S, and GREGORY ELLIS' contacts with California are not so extensive as to confer general jurisdiction or specific jurisdiction. The court finds that despite the fact that plaintiffs have alleged the commission of an intentional tort aimed at

California residents, these defendants do not have sufficient other minimum contacts with California to confer jurisdiction over these nonresident defendants. The Court has analyzed each of the defendants' contacts with California separately and will not impute any of the actions taken by the one and only California resident to the other nonresident defendants based on conspiracy or aiding and abetting allegations. The Court finds that these defendants' stipulation to continue the case management conference does not constitute a general appearance before this court. Based on the foregoing, the summons issued to defendants WILLIAM WISBROD, MICHAEL WISBROD, and GREGORY ELLIS are hereby quashed. [¶] . . . [¶] . . . The Court finds that Texas qualifies as a suitable alternate forum. The private and public interests favor Texas as the more convenient forum to litigate this matter, and thus, trump plaintiffs' choice of the California forum. This case qualifies as an exceptional case justifying dismissal because plaintiffs submitted no evidence that indispensable witnesses and/or parties (e.g., un-named Independent Administratrix Lillian Coplan and Mr. R.W. Calloway, the attorney appointed to represent the unknown beneficiaries) can be sued or required to testify in California and California's interest in this litigation is nominal in comparison to the existence of the strong Texas interests at stake. Accordingly, the instant action is hereby dismissed without leave to amend."

DISCUSSION

"The general rule is that a state may exercise personal jurisdiction over a nonresident defendant 'if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate " 'traditional notions of fair play and substantial justice.'"' [Citations.] Stated another way, 'the forum state may not exercise jurisdiction over a nonresident unless his [or her] relationship to the state is such as to make the exercise of such jurisdiction reasonable.' [Citation.]" (*Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 583 (*Integral Development*); see also, *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 268 (*Pavlovich*).)

Even though the motions to quash service of summons were defendants' motions, the initial burden of proof was on plaintiffs to show the minimum contacts justifying the imposition of personal jurisdiction. " 'Once the facts showing minimum contacts with the forum state are established, however, it becomes the defendant's burden to demonstrate that the exercise of personal jurisdiction would be unreasonable.' [Citations.]" (*Integral Development*, *supra*, 99 Cal.App.4th at p. 584; see also, *Pavlovich*, *supra*, 29 Cal.4th at p. 273.)

Personal jurisdiction may be either general or specific. "General jurisdiction may lie for all purposes if a defendant has established a presence in the forum state by virtue of activities of the state which are 'extensive or wide ranging' [citation] or ' "substantial . . . continuous and systematic."' [Citation.] In such a case a defendant's contacts 'take the place of physical presence in the forum as a basis for jurisdiction.' [Citation.] [¶] If a nonresident defendant's activities in the state are not sufficient to allow the forum state to exercise general jurisdiction for all purposes, the state may nonetheless exercise specific jurisdiction 'if the defendant has purposefully availed himself or herself of forum benefits [citation] and the "controversy is related to or 'arises out of' a defendant's contacts with the forum." [Citation.]' [Citation.] Once a court decides that a defendant has purposefully established contacts with the forum state and that plaintiff's cause of action arose out of those forum-related contacts, the final step in the analysis involves balancing the convenience of the parties and the interests of the state in order to determine whether the exercise of personal jurisdiction is fair and reasonable under all of the circumstances. [Citations.]" (*Integral Development*, *supra*, 99 Cal.App.4th at pp. 583-584; see also, *Pavlovich*, *supra*, 29 Cal.4th at pp. 268-269.)

"The existence of personal jurisdiction will often present a mixed question of law and fact. [Citation.] To the extent that there are factual conflicts, the trial court resolves those disputes and the substantial evidence standard governs our review. [Citation.] The ultimate question whether jurisdiction is fair and reasonable under all the circumstances, based on the facts which are undisputed and those resolved by the court in favor of the prevailing party, is a legal determination warranting our independent review. [Citations.]" (*Integral Development, supra*, 99 Cal.App.4th at p. 585; see also, *Pavlovich*, *supra*, 29 Cal.4th at p. 273.)

"The question whether there are minimum contacts necessary to support personal jurisdiction for purposes of a specific lawsuit involves an evaluation of the 'interrelationship of the defendant's conduct, the forum and the claim.' [Citation.] This inquiry lends itself to a two-step analysis: first, has defendant purposefully directed his or her activities at forum residents or purposefully derived benefit from forum activities; and second, does the controversy arise from defendant's contacts with the forum? Where there is such purposeful conduct by which defendant avails himself or herself of the privilege of conducting activities with the forum state, and such conduct results in a lawsuit, defendant must reasonably expect to submit to the burdens of litigation in the forum state. [Citations.]" (*Integral Development*, *supra*, 99 Cal.App.4th at p. 585; see also, *Pavlovich*, *supra*, 29 Cal.4th at p. 269.) However, a foreign act with foreseeable effects in the forum state does not always give rise to specific jurisdiction. (*Pavlovich*, *supra*, 29 Cal.4th at p. 270.)

Here, the basic facts are not in dispute. Plaintiffs are residents of California and are the half-siblings of Ned, who died intestate in Texas without surviving parent, spouse, or issue. Under Texas law, plaintiffs were entitled to a portion of Ned's estate, but the Texas probate court was not made aware of plaintiffs' existence. Therefore, Ned's estate was distributed to four others, three of whom are defendants in this case: William, a resident of Illinois; Gregory, a resident of Virginia; and Geoffrey, a resident of Santa Cruz. Lillian, a resident of Texas, was the administrator of Ned's estate and also received a distribution from the estate, but she is not a listed defendant. Michael, a listed defendant and, like his father a resident of Illinois, did not receive a distribution from the estate. Calloway, a resident of Texas, was charged with informing the Texas probate court of plaintiffs' existence, but is not a listed defendant.

Plaintiffs allege that all defendants converted plaintiffs' portion of Ned's estate and that defendant Geoffrey deposited his share of the converted funds into his bank account in Santa Cruz. Because venue is proper in the county in which the converted funds are deposited, even though "the instrumentalities employed by [defendants] to bring about the payment of the money by the [bank] were set in motion" in another county (*People v. Keller* (1926) 79 Cal.App. 612, 616), plaintiffs argue that Santa Cruz County is the appropriate forum for plaintiffs' claims.

We agree with plaintiffs that Santa Cruz would be an appropriate venue in California for plaintiffs' claim if all acts constituting the alleged conversions occurred in California. But location of the harm is not dispositive and the alleged instrumentalities employed by defendants here to bring about the payment of the money by the Santa Cruz bank to Geoffrey were set in motion in Texas. Ned's estate was probated in Texas, documents relating to who was entitled to distributions from the estate were filed there, and the estate's funds were distributed from there. Defendants allegedly failed to inform either Calloway or the Texas probate court of plaintiffs' existence, knowing that it would result in plaintiffs, California residents, losing their rightful share of the estate. However, merely asserting that defendants knew or should have known that their intentional acts would cause harm in the forum state is not enough to establish specific jurisdiction. "[T]his knowledge, by itself, cannot establish purposeful availment . . . ." (*Pavlovich*, *supra*, 29 Cal.4th at p. 276.) " '[T]he fact that a defendant's actions in some way set into motion events which ultimately injured a California resident' cannot, by itself, confer jurisdiction over that defendant. [Citation.]" (*Ibid*.) Plaintiffs were required to present additional evidence of intentional conduct expressly aimed at or targeting the forum state in addition to defendants' knowledge that their intentional conduct would cause harm in the forum. (*Id.* at pp. 270-273; but see, *Janmark, Inc. v. Reidy* (7th Cir. 1997) 132 F.3d 1200.) This they did not do.

Plaintiffs did not carry their burden of demonstrating facts justifying the trial court's exercise of specific jurisdiction over defendants William, Michael, and Gregory. Accordingly, the trial court properly granted these defendants' motions to quash service of summons and complaint.

The fact that these defendants had previously stipulated to continue a case management conference does not alter our determination, as defendants did not thereby make a general appearance. "A general appearance by a party is equivalent to personal service of summons on such party." (Code Civ. Proc., § 410.50, subd. (a).) "A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act. [Citations.] 'If the defendant "raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general . . . ." [Citation.]' [Citation.]" (*Mansour v. Superior Court* (1975) 38 Cal.App.4th 1750, 1756-1757; see also, *General Ins. Co. v. Superior Court* (1975) 15 Cal.3d 449, 453-454 (*General Ins.*).)

Defendants' motions to quash and to dismiss were filed April 7 and 8, 2003, and were scheduled to be heard on May 5, 2003. However, that hearing was continued to June 19, 2003, at the request of plaintiffs' counsel so that plaintiffs could conduct discovery. The case management conference was scheduled for May 22, 2003. On May 7, 2003, the parties filed an application and stipulation for order to continue the case management conference to June 19, 2003, on a standard form, with counsel for defendants stating they were making a "special appearance only." The declaration attached to the stipulation for continuance stated that the continuance was requested due to the pending motions to quash and to dismiss. The relief that defendants' requested could be granted without requiring defendants to recognize the jurisdiction of the court to proceed against them personally. And the stipulation does not reflect an intent to submit to the jurisdiction of the California court. (See, *General Ins*., *supra*, 15 Cal.3d at p. 453.) Thus, defendants' stipulation to continuance of the case management conference in this case did not constitute a general appearance.

Plaintiffs argue that the trial court erred in dismissing the action. They argue that all relevant factors under the forum non conveniens doctrine favor California rather than Texas as the proper forum. They further argue that, even if California is an inconvenient forum, the trial court should have stayed rather than dismissed the action.

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. [Citation.]" (*Stangvik v. Shiley Inc*. (1991) 54 Cal.3d 744, 751 (*Stangvik*).) "In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California." (*Ibid*.) "The availability of a suitable alternative forum for the action is critical. . . . 'In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.' [Citation.]" (*American Cemwood Corp. v. American Home Assurance Co*. (2001) 87 Cal.App.4th 431, 435.) Because the suitability of a forum depends solely on the forum's jurisdiction over the parties and the absence of any statute of limitations bar to resolution of the dispute on the merits in that forum, a trial court's decision that another forum is suitable, unlike its balancing of interests, is not a discretionary decision entitled to any deference on appeal. (*Id*. at p. 436.) Thus, we exercise de novo review over the superior court's finding that Texas was a suitable forum. (*Ibid*.)

There is no contention here that there was any statute of limitations bar to resolution of this dispute on the merits in Texas. Plaintiffs' challenge to the superior court's suitable alternative forum finding is based on its claim that "Texas has no interest whatsoever in the parties' dispute at this juncture, and that there are no evidentiary facts to be uncovered in Texas. Ned's estate has already been distributed outside of Texas to respondents, nonresidents of Texas. Appellants are California residents with no connection whatsoever to Texas. Why would Texas, as opposed to California, have any interest in vindicating the rights of appellants."

We disagree with plaintiffs' claim that Texas has no interest in the parties' dispute. Plaintiffs' suit challenges the integrity of the judgment of a Texas probate court. Also, Texas law regarding intestate succession is involved; important witnesses, such as Lillian and Calloway, reside there; defendants have already consented to the jurisdiction of the Texas court and plaintiffs would have had to submit to Texas jurisdiction in order to receive a distribution from decedents' estate. In contrast, defendants have not consented to the personal jurisdiction of the California court and neither have Lillian or Calloway, two important witnesses to the distribution of decedent's estate. The trial court properly found that Texas was a suitable forum.

The only remaining question is whether the trial court abused its discretion in finding that the private and public interests favor Texas as the more convenient forum to litigate plaintiffs' matter. The balancing of private and public interests is a task squarely within the trial court's discretion. (*Stangvik*, *supra*, 53 Cal.3d at pp. 751-752.) Although defendants bore the burden of proving that the balance favored dismissing the action in favor of Texas, and an action brought by a California resident may not be dismissed on grounds of forum non conveniens except in extraordinary circumstances, the superior court's discretionary decision to dismiss this action is accorded "substantial deference" on appeal. (*Id.* at pp. 751, 756.) "The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]" (*Id*. at p. 751.) "In considering whether to stay an action, in contrast to dismissing it, the plaintiff's residence is but one of many factors which the court may consider. The court can also take into account the amenability of the defendants to personal jurisdiction, the convenience of witnesses, the expense of trial, the choice of law, and indeed any consideration which legitimately bears upon the relative suitability or convenience of the alternative forums. [Citations.]" (*Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 860.)

The factors relevant to the balancing of the private interests of the parties and the public interests do not clearly favor California. Three of the four defendants' domiciles are not in California. While the source of some of plaintiffs' evidence and some of their witnesses may be located in California, it is equally true that defendants' documentary evidence and their witnesses can primarily be found in Texas. The record is devoid of any information about the nature of the Texas court's calendar in terms of congestion, but the trial court was clearly aware of whether its own calendar was congested. Also, plaintiffs' dispute arises under Texas probate law and defendants have already submitted to the jurisdiction of the Texas court. Since the balancing does not clearly favor California, we must defer to the superior court's discretionary decision to accord more weight to the factors favoring Texas. Consequently, we find no abuse of discretion in the superior court's decision to dismiss the Santa Cruz action. (*Stangvik*, *supra*, 53 Cal.3d at pp. 751, 756.)

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

____

PREMO, ACTING P.J.

____

WALSH, J.*

* Judge of the Santa Clara Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.